Supreme Court, U.S.
FILED
MAY 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1793

IN THE

Supreme Court of the United States

October Term, 1985

LOUIE L. WAINWRIGHT,
Secretary, Florida Department
of Corrections

Petitioner,

v.

JIMMY LEE SMITH,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Sarah M. Bleakley
1829 Combs Road
Tallahassee, FL 32301
(904) 878-6471

HOLLAND & KNIGHT

Gregg D. Thomas
Counsel of Record
Julian Clarkson
Steven L. Brannock
Post Office Box 1288
Tampa, Florida 33601
(813) 223-1621

44pp

QUESTION PRESENTED FOR REVIEW

I. WHETHER THE ELEVENTH CIRCUIT CORRECTLY RULED THAT AN EVIDENTIARY HEARING IS NECESSARY TO DETERMINE SMITH'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A. An Evidentiary Hearing Is Needed To Test Smith's Claims That He Was Unconstitutionally Denied Effective Assistance of Counsel.

B. Smith Has Not Procedurally Defaulted On His Ineffective Assistance Claim.

C. Smith's Petition For Habeas Corpus Presents A Sufficient Predicate For The Relief Granted By The Eleventh Circuit Court of Appeals.

TABLE OF CONTENTS

PAGE

Question Presented for Review i

Table of Contents ii

Table of Citations iii

Statement of the Case and Facts 1

Summary of the Argument 2

Argument 5

I. THE ELEVENTH CIRCUIT CORRECTLY RULED THAT AN EVIDENTIARY HEARING IS NECESSARY TO DETERMINE SMITH'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A. An Evidentiary Hearing Is Needed To Test Smith's Claims That He Was Unconstitutionally Denied Effective Assistance of Counsel.

B. Smith Has Not Procedurally Defaulted On His Ineffective Assistance Claim.

C. Smith's Petition For Habeas Corpus Presents A Sufficient Predicate For The Relief Granted By The Eleventh Circuit Court of Appeals.

Conclusion 38

TABLE OF CITATIONS

CASES	PAGE(S)
Birt v. Montgomery, 725 F.2d 587 (11th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 232, 83 L.Ed.2d 161 (1984)	30
Boyer v. Patton, 579 F.2d 284 (3d Cir. 1978)	30
Brewer v. Williams, 430 U.S. 387 (1977)	15
Capital Films Corp. v. Charles Fries Productions, Inc., 628 F.2d 387 (5th Cir. 1980)	24
Carrier v. Hutto, 754 F.2d 520 (4th Cir. 1985), cert. granted, ___ U.S. ___, 105 S.Ct. 3523, 87 L.Ed.2d 649 (1985)	30
Edwards v. Arizona, 451 U.S. 477 (1981)	11
Estelle v. Williams, 425 U.S. 501 (1976)	19, 27
Faretta v. California, 422 U.S. 806 (1975)	25, 26
Gray v. Greer, 778 F.2d 350 (7th Cir. 1985)	32
Hanson v. Polk County Land, Inc., 608 F.2d 129 (5th Cir. 1979)	24
Johnson v. Blackburn, 778 F.2d 1044 (5th Cir. 1985)	33

Johnson v. Zerbst,
304 U.S. 458 (1938) 12

Jurek v. Estelle,
593 F.2d 672 (5th Cir. 1979),
on rehrg, 623 F.2d 929,
cert. denied, 450 U.S. 1001 (1981) 30

Michigan v. Mosley,
423 U.S. 96 (1975) 11, 17

Miller v. Fenton,
___ U.S. ___, 106 S.Ct. 445,
88 L.Ed.2d 405 (1985) 13

Miranda v. United States,
384 U.S. 436 (1966) 11, 16

Moran v. Burbine,
54 U.S.L.W. 4265 (March 11, 1986) 15, 16

Morrison v. Kimmelman,
752 F.2d 918 (3d Cir.),
cert. granted, ___ U.S. ___,
106 S.Ct. 59, 88 L.Ed.2d 47 (1985) 33, 34

Oregon v. Elstad,
___ U.S. ___, 105 S.Ct. 1285,
84 L.Ed.2d 222, (1985) 14

Pate v. Robinson,
383 U.S. 375 (1966) 18, 27

Rhode Island v. Innis,
446 U.S. 291 (1980) 11

Smith v. State,
445 So.2d 323 (Fla. 1983) 29

Smith v. Wainwright,
777 F.2d 609 (11th Cir. 1985) 21, 23

Stone v. Powell,
428 U.S. 465 (1976) 33, 34

Strickland v. Washington,
466 U.S. 668 (1984) 2, 8, 9, 18, 19, 27, 31, 32, 33, 35, 36

Townsend v. Sain,
372 U.S. 293 (1963) 1, 17, 28

United States v. Bayer,
331 U.S. 532 (1947) 14

United States v. Cronic,
466 U.S. 648 (1984) 2, 18, 19, 20, 25, 26, 27, 31, 32, 33, 34, 35

Wainwright v. Sykes,
433 U.S. 72 (1977) 28, 30, 31

Witherspoon v. Illinois,
391 U.S. 510 (1968) 18

OTHER AUTHORITY

Rule 11, Rules Governing
Section 2264 Cases 28

Rule 56(c), Fed. R. Civ. P. 23

Rule 3.850, Fla. R. Crim. P. 23

STATEMENT OF CASE AND FACTS

Smith accepts the Court of Appeals' statement of the case and facts with one point of clarification. The State's statement of the case gives the impression that the Eleventh Circuit reversed on the basis of the underlying substantive issues. In fact, the ruling below is interlocutory in nature because it concerned only the necessity of further factual development under Townsend v. Sain, 372 U.S. 293 (1963).[1]

---

[1] In this Response, the record below is referred to as ("RV [Volume], [Page]"). For example, RV 3, 23 refers to page 23 of volume 3 of the record. "A." refers to petitioner's appendix. "Pet." refers to the State's petition for writ of certiorari in this case.

SUMMARY OF THE ARGUMENT

Smith petitioned for habeas corpus relief alleging that his trial counsel was ineffective under the standards of Strickland v. Washington and United States v. Cronic. The Eleventh Circuit ruled that it needed more facts to properly analyze Smith's ineffective assistance of counsel claims and remanded the case to the district court for an evidentiary hearing. In essence, the Eleventh Circuit ruled that it would be premature to address Smith's claims on an inadequate factual record. Despite the interlocutory nature of the Eleventh Circuit's decision, the State asks this Court to rule on the underlying issue of ineffective assistance of counsel.

The State's attempt to seek review at this "interlocutory" stage of the proceeding should be denied. Substantial facts

remain to be developed concerning the confessions that Smith's counsel failed to move to suppress below. These questions include Smith's attempt to invoke his right to counsel prior to interrogation by the State, the circumstances surrounding Smith's "waiver" of his right to counsel, whether Smith's confessions were coerced, and the State's interference with counsel's attempt to effectively represent Smith during the interrogation. Substantial questions also remain concerning the reasonableness of counsel's decision not to move to suppress the confessions and the soundness of numerous other actions that counsel took (or failed to take) in Smith's defense.

Smith has not procedurally defaulted on his claims of ineffective assistance of counsel. These allegations were raised at each previous proceeding at which Smith had an opportunity to challenge his coun-

sel's effectiveness. Nor is the State correct in its argument that Smith's petition did not state a basis for the relief granted by the Eleventh Circuit. To the contrary, both the district court and the Eleventh Circuit ruled that Smith's petition adequately set forth facts that, if true, would state a basis for granting the writ of habeas corpus. These courts were correct. The petition describes in great detail the ineffective assistance alleged and the prejudice that resulted from counsel's actions. The writ of certiorari should be denied.

ARGUMENT

I. THE ELEVENTH CIRCUIT CORRECTLY RULED THAT AN EVIDENTIARY HEARING IS NECESSARY TO DETERMINE SMITH'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The State completely misses the point of the decision below. The Eleventh Circuit has done nothing more than decide that it needs an evidentiary hearing before it rules on Jimmy Lee Smith's allegations of ineffective assistance of counsel. Largely skirting the narrow issue of whether an evidentiary hearing is necessary, the State prematurely directs this Court to the merits of Smith's underlying Fifth, Sixth and Fourteenth Amendment claims.

The State faces a heavy burden in this petition. It must convince this Court that Smith could not prove he was denied effective assistance of counsel

under any conceivable set of facts consistent with the allegations in his petition. The Eleventh Circuit correctly rejected the State's approach by holding that a ruling on the substantive issues in this case should await the development of a complete factual record.

The State's brief also misperceives the purpose of the writ of certiorari. The writ is designed to enable this Court to resolve substantial unanswered federal questions or to settle important conflicts between the circuits. The writ does not serve as a second appeal. The Eleventh Circuit's decision to require an evidentiary hearing hardly represents a substantial issue worthy of the limited resources of this Court. Nor does the decision present a conflict. Indeed, the State's brief often leaves this Court to guess the names of the cases that allegedly conflict with the Eleventh

Circuit's decision below. Incredibly, none of the conflicts suggested by the State concern the ultimate issue in this proceeding, the grant or denial of an evidentiary hearing. The State's application for the writ of certiorari should be denied.

A. An Evidentiary Hearing Is Needed To Test Smith's Claims That He Was Unconstitutionally Denied Effective Assistance of Counsel.

Smith's habeas corpus petition alleges that his appointed public defender failed to provide him effective assistance of counsel at the guilt-innocence and sentencing phases of his trial. Smith's claim is primarily based upon his counsel's failure to move to suppress the admission at trial of four (4) confessions secured by the State while Smith was in custody and after counsel had been appointed to represent him. To succeed in

his petition, Smith must prove that his appointed counsel erred (by showing that the confessions were in fact suppressible), that he was prejudiced by counsel's error, and that counsel's failure to move to suppress the confessions was not reasonable trial strategy. Strickland v. Washington, 466 U.S. 668 (1984). The State's argument primarily addresses the first of these issues, the underlying suppressibility of the confessions.[2] (Pet. at 13-19).

---

[2] As to the issue of whether the failure to move to suppress was reasonable trial stragegy, both the District Court and the Eleventh Circuit agreed that the reasonableness of counsel's decision could be determined only after an evidentiary hearing. (See A. 42-44, 96, 98-99). The State does not argue this point other than to say that the strategy question can be resolved solely by reference to trial counsel's self-serving affidavit. See 21-24, infra. On the issue of whether Smith was prejudiced by the failure to suppress, the State notes in its statement of facts that the Eleventh Circuit and the Supreme Court of Florida disagree about

Four confessions were entered into evidence against Smith at his trial. The facts show that the earliest confession offered as evidence against him was secured May 5, 1978 at approximately 12:10 p.m. (RV 3, 23; RV 4, 392, 395).[3] Prior

---

whether Smith would have been convicted in the absence of the confessions. However, other than to note that disagreement in its factual statement, the State does not argue that the Eleventh Circuit's disagreement forms a basis for granting the writ. The prejudice issue is a mixed question of law and fact and therefore the Eleventh Circuit is not subject to rulings of the Supreme Court of Florida or the District Court on the subject. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, 700 (1984). In any event, the Eleventh Circuit is correct. In the absence of the confessions, the State's case is entirely circumstantial. The State had no alternative evidence of premeditation to support a conviction for first degree murder (A. 37-40). Moreover, the Supreme Court of Florida completely overlooked the fact that the only evidence supporting the death penalty was contained in the confessions. Certainly, Smith has been prejudiced by the wrongful imposition of a death sentence.

[3] An earlier confession was obtained on May 4, 1978, but it was never entered into evidence against Smith. Thus, noth-

to that confession, Smith had attended two first appearances before a Magistrate. Smith unequivocally invoked his right to counsel at each of those hearings (A. 124, 132). The affidavit of trial counsel submitted by the State (the "State's Affidavit"), shows that Smith had counsel appointed for him as early as May 3, 1978 (A. 109-112). According to the State's Affidavit, by the time of the May 5, 1978 confession, trial counsel had established an attorney-client relationship with Smith and had visited him at the jail on May 2, 3, and 4 (A. 108-113).

Smith's interrogators knew that he had invoked his right to counsel, yet the State's Affidavit shows that the State initiated further questioning of Smith in the absence of appointed counsel (RV 3, 7; A. 110). Smith alleges that the confessions elicited during this question-

---

ing is known about the circumstances surrounding the first confession (A. 44-45).

ing in the absence of counsel were unconstitutionally coerced. (Petition at 14, 15, 44, 45).

Smith had the right to have counsel present during the State's interrogations. Miranda v. United States, 384 U.S. 436 (1966). Interrogation of an accused without assistance of counsel is inherently coercive. According to this Court, "compulsion" is inherent in custodial surroundings. Miranda at 439. See Rhode Island v. Innis, 446 U.S. 291 (1980); Michigan v. Mosley, 423 U.S. 96 (1975). Thus, where an accused invokes his right to have counsel present during custodial interrogation, interrogation must cease until counsel is provided. Edwards v. Arizona, 451 U.S. 477 (1981). According to Edwards, a confession obtained from a defendant after a request for counsel violates a defendant's Fifth, Sixth, and

Fourteenth Amendment rights to have counsel present.

The State argues that any procedural error in the State's questioning was waived by Smith. However, the inherently coercive nature of custodial interrogation imposes a heavy burden upon the State to demonstrate the voluntary nature of the waiver of privileges against the self-incrimination and the right to counsel. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Whether the confession is voluntary depends on whether it is the product of an essentially free and unconstrained choice by the accused. Johnson, 304 U.S. at 464.

To rule on Smith's habeas petition, the court must determine whether the State coerced Smith's confessions.[4] It is

---

[4] The question of the voluntariness of the confession concerns a matter of law

impossible to make that determination on the evidentiary record as it now exists. According to the Eleventh Circuit, the following substantial fact questions must be resolved before the suppressibility issue can be reached:

(1) Was the May 4, 1978 confession coerced and, if so, had the coercion dissipated by the time of the subsequent confessions? There are virtually no facts in the record concerning the critical initial confession. Indeed, the fact that the State chose not to seek the admission of that confession into evidence indicates that even the State may have had questions regarding its admissibility. While proof that an initial confession is improper will not automatically invalidate subse-

---

that is subject to complete review by the Eleventh Circuit. Miller v. Fenton, ___ U.S. ___, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985).

quent confessions, subsequent confessions must be excluded if coercion following the first statement had not dissipated at the time of subsequent statements. United States v. Bayer, 331 U.S. 532, 541 (1947). Here, the confessions that were introduced into evidence took place in rapid sequence following the May 4 confession (A. 8). The grouping of the confessions raises the fact question of whether the taint of the first confession infected the later confessions. See Oregon v. Elstad, ___ U.S. ___, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985) ("the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements").

(2) Did Smith's counsel instruct the State not to interrogate Smith in counsel's absence? If not, why not? Smith's trial counsel had several conversations

with the interrogators. The record does not reveal what the interrogators told counsel. There is nothing in the record to indicate what instructions, if any, trial counsel gave the interrogators about questioning Smith. Nor, if there were no instructions, does the record reveal why counsel did not instruct the interrogators to cease their ex parte interrogation of Smith. Had defense counsel requested a termination of the interrogation in his absence, the State's initiation of additional questioning would violate Smith's Fifth, Sixth, and Fourteenth Amendment rights to counsel. See Brewer v. Williams, 430 U.S. 387 (1977).[5]

---

[5] The State's reliance on Moran v. Burbine, 54 U.S.L.W. 4265 (March 11, 1986) is misplaced. Moran was decided by this Court on the basis of a full evidentiary hearing. Thus, in Moran, the circumstances surrounding counsel's attempt at contact and the defendant's waiver were fully understood. Indeed, the defendant

(3) Did Smith receive Miranda warnings during the interrogations? The record does not reveal whether the interrogators properly advised Smith of his Fifth Amendment right to remain silent and of his right to the presence of counsel during questioning as required under Miranda v. Arizona, 384 U.S. 436 (1966).

(4) Did the State honor Smith's right to remain silent if it was invoked? If Smith was advised of his rights, the record is silent as to whether he invoked those rights. The question is "whether his 'right to cut off questioning' was

---

in Moran conceded that his confessions were given voluntarily (aside from the question raised by his ignorance of counsel's attempt to contact him). Moran's claims were also rejected because his right to counsel had not yet attached at the time of the interrogation. By way of contrast, an evidentiary hearing is needed in this case to determine if Smith's right to counsel had attached at the time of the confessions (A. 48-53).

'scrupulously' honored." Michigan v. Mosley, 423 U.S. 96 (1975).

(5) Was counsel's decision not to move to suppress the confessions reasonable trial strategy? The record is virtually silent on the critical issue of whether counsel's choice not to move to suppress the confessions was a reasonable strategic decision. Other than the untested affidavit of counsel, the facts concerning the reasonableness of trial counsel's strategy remain undeveloped.

In the words of the Eleventh Circuit, "these are but a few of the factual questions which must be resolved before we can address the issue of whether Smith received ineffective assistance of counsel at the guilt-innocence phase of his trial" (A. 52). This Court has held that an evidentiary hearing is required whenever crucial facts are not developed at the state court level. Townsend v. Sain, 372

U.S. 293 (1963). Because the crucial facts remained undeveloped, the Eleventh Circuit correctly determined that an evidentiary hearing on the Strickland ineffective assistance claim was necessary.

Smith has also alleged that his trial counsel's overall performance was so deficient that prejudice should be presumed under the standard enunciated in United States v. Cronic, 466 U.S. 648 (1984).[6]

---

[6] Smith contends that his trial counsel was deficient in several respects, including: (1) failing to conduct an adequate voir dire of prospective jurors consistent with the precepts of Witherspoon v. Illinois, 391 U.S. 510 (1968); (2) failing to investigate and present evidence of Smith's mental state at the time of the alleged murders; (3) failing to inform the trial court that Smith had attempted suicide while in jail pending trial, and thus, pursuant to his physican's instructions, Smith was taking Psychotropic medication while awaiting trial, and of other evidence tending to show that Smith was incompetent; (4) failing to request a competency hearing under Pate v. Robinson, 383 U.S. 375

The Eleventh Circuit ruled that the Cronic claims, like Smith's Strickland claims, could not be addressed until the facts were further developed. For example, the record contains no explanation of trial counsel's decisions and, consequently, it is impossible to determine whether those decisions were reasonable strategic decisions or mere inadvertence. The Eleventh Circuit concluded:

> Prejudice is presumed under the Cronic analysis. The emphasis, therefore, is upon the circumstances under which counsel performed or whether counsel performed in a truly adversarial manner. Here, as under the Strickland analysis, the facts must be more fully developed before we can determine whether

---

(1966); (5) failing to investigate and present mitigating evidence at the penalty phase of Smith's trial; and (6) stipulating to the admission of a videotaped confession of Smith clothed in prison garb during the penalty phase in violation of the precepts of Estelle v. Williams, 425 U.S. 501 (1976).

> Smith has met his burden of proof under Cronic.

(A. 56-57).

The failure to develop facts cannot be attributed to Smith. The Eleventh Circuit accurately noted that Smith had requested an evidentiary hearing, along with the State, when the ineffectiveness claim was first presented to the state trial court in March, 1983. Similarly, Smith requested an evidentiary hearing before the District Court in July, 1984. Even the District Court noted that an evidentiary hearing would have been helpful:

> I think it would have been preferable to have held an evidentiary hearing at the trial court level. I certainly would encourage state trial judges to do so, because it would alleviate a lot of the concern that comes before federal judges when the matter gets to this almost critical stage.

Smith v. Wainwrignt, (N.D. Fla. July 11, 1984) (A. 99).[7]

Petitioner contends that the unrebutted affidavit of trial defense counsel should negate an evidentiary hearing into counsel's alleged ineffectiveness. However, as a result of the circumstances under which counsel's affidavit was prepared, filed, and presented, reliance on the affidavit would be procedurally unsound and fundamentally unfair.

---

[7] The Florida Supreme Court and the district court denied the requests for an evidentiary hearing, not because factual development was unnecessary, but because they erroneously determined that Smith was not prejudiced by the admission of the four confessions. The Eleventh Circuit disagreed, correctly noting that the State's evidence was otherwise weak and circumstantial. Moreover, there was no evidence outside the confessions to support a conviction for first degree murder or to prove the aggravating circumstances necessary for the imposition of the death penalty (A. 37-40).

Smith's first petition for writ of habeas corpus to be considered on the merits was filed on Monday, July 9, 1984, in the United States District Court for the Northern District of Florida. On that same day, trial defense counsel executed his affidavit. The affidavit and the State's motions to dismiss and for summary judgment were contemporaneously served on Smith's counsel on the next day, July 10, 1984. The District Court held a hearing on the petition on the following day, July 11, 1984. After oral argument, the Court dismissed the petition. However, in the process of ruling on the petition, the District Court noted that Smith had no opportunity to respond to the affidavit:

> The State has filed an affidavit. There is some question as to how that affidavit should be considered by the court. For purposes of summary judgment proceedings obviously Smith's attorneys have not had an opportunity to at least

> respond to the affidavit in some way, but I find the affidavit is properly filed with the Court. But I'm not going to consider it for purposes of ruling either on a motion to dismiss or a motion for summary judgment.

Smith v. Wainwright, (N.D. Fla., July 11, 1984) (A. 97).

The District Court's decision not to consider the affidavit in the context of a motion for summary judgment or a motion to dismiss is correct. Rule 11, Rules Governing Section 2254 Cases, provides that:

> The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate to petitions filed under these rules.

Rule 56(c), Federal Rules of Civil Procedure, which governs summary judgment procedures, states in pertinent part that: "The motion shall be served at least ten (10) days before the time fixed for the hearing." In this case the affidavit and

motions were served the day before the hearing. This procedural infirmity is not an unimportant technicality, but a critial element which incorporates due process considerations. See Capital Films Corp. v. Charles Fries Productions, Inc., 628 F.2d 387, 391-2 (5th Cir. 1980); Hanson v. Polk County Land, Inc., 608 F.2d 129, 131 (5th Cir. 1979). The Eleventh Circuit agreed:

> Assertions in affidavits are a far cry from assertions made under circumstances which subject them to probing cross-examination.

Smith, at A. 213. The evidentiary hearing ordered by the Eleventh Circuit will provide Smith with his first opportunity to present testimony to rebut trial defense counsel's affidavit and to prove Smith's allegations of ineffective assistance of counsel.

Finally, the State contends that Smith's pervasive lack of cooperation was the sole reason for trial defense counsel's ineffective assistance and thus there is no need for an evidentiary review of Smith's claims under United States v. Cronic, 466 U.S. 648 (1984). The State's claim is self-defeating. To the extent it wishes to rely on Smith's interference with counsel, the facts are woefully underdeveloped. Here, the evidentiary hearing requested by the Eleventh Circuit will delve not only into the facts which are supportive of Smith's claims, but will also explore the State's claims regarding Smith's uncooperative behavior.

Furthermore, the State's legal argument is defective. In essence, the State is arguing that Smith waived his right to counsel at the guilt-innocence phase of trial. See Petition at 42. This Court's decision in Faretta v. California, 422

U.S. 806, 835-36 (1975), requires a "knowing and intelligent" relinquishment of the right to counsel. At the guilt-innocence phase of the trial, there was no de facto waiver, much less a waiver in which the court participated and advised Smith of his rights. The State has cited no case which holds that waiver can be established by defendant's hindrance of counsel. Even if hindrance could constitute a waiver, the State offers no explanation for counsel's failure to notify the court of these "impediments" or to withdraw if effective representation was impossible.

In any event, the deficiencies that Smith cites to support his Cronic ineffectiveness arguments could not conceivably have been caused by Smith. See n.6, supra. Smith is not responsible for counsel's defective voir dire. Smith did not control counsel's faulty investigation of Smith's mental background. Smith did not

order his counsel not to reveal the fact of Smith's attempted suicide or the fact that he was taking psychotrophic drugs while awaiting trial. Smith did not instruct his counsel not to request a competency hearing under Pate v. Robinson, 383 U.S. 375 (1966). Smith did not ask his counsel to stipulate to the admission of a videotaped confession of Smith clothed in prison garb during the penalty phase in violation of the principles of Estelle v. Williams, 425 U.S. 501 (1976).

The Eleventh Circuit clearly and definitively decided that the existing record in this case failed to develop the material facts necessary to evaluate respondents' Strickland and Cronic claims. The failure to adequately develop the facts is attributable neither to neglect nor deliberate bypass. Accordingly, the Eleventh Circuit correctly held under the precepts of this Court's ruling in

Townsend v. Sain that an evidentiary hearing was required before proceeding to the merits of Smith's claims.

B. Smith Has Not Procedurally Defaulted On His Ineffective Assistance Of Counsel Claims.

The State incorrectly maintains that Smith is procedurally barred from raising the ineffectiveness of counsel issue by Wainwright v. Sykes, 433 U.S. 72 (1977). Under Wainwright v. Sykes, Smith is barred to the extent he failed to raise the ineffectiveness issue in the appropriate proceeding below. However, Smith has sought review of the effectiveness of his trial counsel at each stage of collateral review. The issue was raised in Smith's first petition for post-conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure. Smith unsuccessfully appealed that unfavorable disposition to

the Supreme Court of Florida. Smith v. State, 445 So.2d 323 (Fla. 1983). Smith again raised the issue in his habeas corpus petition to the District Court for the Northern District of Florida. He raised the issue again in the Eleventh Circuit Court of Appeals and was finally granted the evidentiary hearing which he had sought every step of the way. It is absurd to suggest that Smith has defaulted on the ineffectiveness claim.

The State's brief confuses the ineffectiveness of counsel issue with the underlying suppressibility of the confessions. Smith's counsel did procedurally default on the suppression issue by failing to object to the admission of the confessions at trial. Thus, only if Smith were attempting to litigate the underlying suppressibility issue itself, would the Eleventh Circuit Court of Appeals have been obligated to test

Smith's claims under the Wainwright v. Sykes criteria.[8]

Here, Smith's claim encompasses far more than the suppression issue. Smith

---

[8] Even under Wainwright v. Sykes, if Smith can prove cause and prejudice he can litigate the underlying suppression issue. Several circuits, including the Eleventh Circuit, have held that the cause requirement of Wainwright v. Sykes is satisfied when counsel is found to be ineffective and the procedural default was a result of that ineffectiveness. See Birt v. Montgomery, 725 F.2d 587, 597 (11th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 232, 83 L.Ed.2d 161 (1984). See also Jurek v. Estelle, 593 F.2d 672 (5th Cir. 1979), on rehearing, 623 F.2d 929, cert. denied, 450 U.S. 1001 (1981); Boyer v. Patton, 579 F.2d 284, 287-88 (3d Cir. 1978).

This Court granted certiorari to review a similar ruling in Carrier v. Hutto, 754 F.2d 520 (4th Cir. 1985), cert. granted, ___ U.S. ___, 105 S.Ct. 3523, 87 L.Ed.2d 649 (1985). However, the Fourth Circuit there allowed a claim of ineffectiveness that did not violate a defendant's Sixth and Fourteenth Amendment rights to constitute "cause" within the meaning of Wainwright v. Sykes. Smith has alleged (and the Eleventh Circuit requires) a showing of ineffectiveness that rises to the level of a constitutional violation. Birt, 725 F.2d at 597.

asked the Eleventh Circuit Court of Appeals to remand for an evidentiary hearing on his claim that he was denied effective assistance of counsel under Strickland v. Washington. No doubt the suppressibility of the confessions is one element of Smith's ineffectiveness claim. However, counsel's error on the suppression issue is but one of several elements that must be proven by Smith to prevail. Moreover, Smith has raised ineffectiveness claims under the Cronic standard. The suppression issue forms only a minor portion of the many issues supporting Smith's Cronic claim.

Apparently, the State wishes to overlay the requirements of Wainwright v. Sykes onto the requirements of Strickland v. Washington. Thus, the State would eliminate all avenues for review of counsel's performance where counsel's ineffectiveness caused a prodedural

default. In effect, federal courts would be placed in the untenable position of having the ability to review bad decisions of counsel while being precluded from review when counsel has failed to act altogether.

Federal courts have not reached such an absurd conclusion. Where ineffective assistance of counsel claims have been raised and properly preserved, as in this case, the federal courts have not looked to Wainwright v. Sykes as preliminary to review on the Strickland or Cronic ineffectiveness claims. In Gray v. Greer, 778 F.2d 350 (7th Cir. 1985), the Seventh Circuit Court of Appeals analyzed a claim under Strickland that appellate counsel was ineffective in failing to file an appeal, resulting in default on a significant constitutional claim. As in this case, the court held that analysis under Wainwright v. Sykes was unnecessary to the

analysis of the ineffectiveness issue because it had been properly preserved. In Johnson v. Blackburn, 778 F.2d 1044 (5th Cir. 1985), the Fifth Circuit Court of Appeals clearly distinguished between the underlying defaulted claim (which concerned faulty jury instructions) and the defendant's complaint that counsel's failure to object to those instructions constituted ineffective assistance. Id. at 1048. The ineffective assistance of counsel claim was analyzed independently under the Strickland test and was not barred by Wainwright v. Sykes. Id. at 1048-49.[9]

---

[9] The issue here should be distinguished from that presented in Morrison v. Kimmelman, 752 F.2d 918 (3d Cir.), cert. granted, ___ U.S. ___, 106 S.Ct. 59, 88 L.Ed.2d 47 (1985). Kimmelman concerns a defendant's right to argue that ineffectiveness of counsel was to blame for the failure to exclude evidence obtained in violation of the Fourth Amendment. A defendant is prohibited under Stone v.

The Eleventh Circuit below was not misled by the state's attempt to turn Smith's claim of ineffective assistance of counsel into a claim on the underlying

---

Powell, 428 U.S. 465 (1976), from raising a Fourth Amendment claim in the context of habeas relief. Stone was based on this Court's determination that the privacy interests protected by the Fourth Amendment were too remote from the point where federal review occurs to warrant the intrusion into the judicial process that would result from habeas review. Id. at 482-83. Even if this Court extends the reach of Stone to ineffective assistance claims, the analogy should not be drawn to ineffective assistance claims based on underlying Fifth and Sixth Amendment violations. Those Amendments are not based upon remote privacy interests but instead preserve the integrity of the criminal process itself.

Even if this Court reversed Kimmelman and decided in the context of this "interlocutory" proceeding to apply its logic to the Fifth and Sixth Amendment claims asserted here, an evidentiary hearing would still be necessary on Smith's Cronic claims where default is not an issue.

issue of the suppression of the confessions. Smith is not in procedural default on his Strickland and Cronic ineffective assistance claims.

C. Smith's Petition For Habeas Corpus Presents A Sufficient Predicate For The Relief Granted By The Eleventh Circuit Court Of Appeals.

Both the district court for the Northern District of Florida and the Eleventh Circuit Court of Appeals found that Smith's Petition for Habeas Corpus relief pleaded sufficient detail of counsel's ineffective acts and omissions to warrant the finding of ineffective assistance.[10]

---

[10] The district court's oral order stated that "the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in an appropriate pleading. I find that that has been done here" (emphasis added) (A. 94).

Upon review of Smith's allegations, the Eleventh Circuit expressly concluded

In their analyses of Smith's right to effective counsel under Strickland v. Washington, the two courts differed only on the issue of whether the ineffective assistance of counsel actually prejudiced Smith.[11] Despite the clear holdings of the courts below, the State now claims that Smith's petition was insufficient.

To the contrary, the sixty-page petition sets forth specific allegations that, if true, support a finding of ineffective assistance of counsel. The Petition for Writ of Habeas Corpus alleges substantive facts which show that Smith's inculpatory

---

that the "allegations, if true, are sufficient to state a constitutional violation" (A. 32).

[11] While the district court claimed to be ruling on the State's Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted, the order clearly reflects a reliance on the underlying record in its determination that no prejudice resulted. Therefore, in effect, the court's ruling is in the nature of a Rule 56 summary judgment.

statements were suppressible, that his trial counsel failed to move to suppress those statements, and that such failure worked to his prejudice at trial.[12]

The fact finding ordered by the Eleventh Circuit directly related to those allegations in the petition. The State's insufficient pleading argument is without merit and should be rejected.

---

[12] Relevant allegations are found in paragraphs 22-25, 50-51, 99-104, and 111-112 of the Petition for Habeas Corpus.

CONCLUSION

For all the foregoing reasons the State's petition for writ of certiorari should be denied.

Gregg D. Thomas
Counsel of Record
Steven L. Brannock
Julian Clarkson
Post Office Box 1288
Tampa, Florida 33601
(813) 223-1621

Sarah M. Bleakley
1829 Combs Road
Tallahassee, FL. 32301
(904) 878-6471